



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 3, 1991

Ms. Iris J. Jones
City Attorney
P. O. Box 1088
Austin, Texas 78767-8828

OR91-603

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 13641.

You have received a request for information relating to a certain bid proposal. Specifically, the requestor seeks "a complete copy of each proposal submitted for Solicitation No: 910546-3AB, 'Performance of Business Risk Analysis'" by the following firms:

1. Dataguard
2. Andersen Consulting
3. Coopers & Lybrand
4. KPMG Peat Marwick
5. Comdisco (CDRS)
6. Sungard
7. Deloitte & Touche
8. Berger & Co.
9. IBM
10. Ask
11. CCS Management Consulting
12. Aim
13. The Warner Group
14. Chamisa Associates

You advise us that Andersen Consulting, Coopers & Lybrand, Comdisco Consulting Services, Sungard Planning Solutions Inc., CCS Management Services, and Advanced Information Management object to release of the requested information. You claim that the information is excepted from required public disclosure by sections 3(a)(1) and 3(a)(10) of the Open Records Act. You have not indicated, however, that the remaining companies wish to withhold their proposals from public disclosure. Accordingly, we presume this information to be public and will not address the applicability of the Open Records Act to it in this ruling.

Pursuant to section 7(c) of the act, we have notified the third parties whose proprietary interests may be compromised by disclosure of the requested information. In response, we have received letters from Coopers & Lybrand, Comdisco, Sungard, CCS, and AIM. Coopers & Lybrand claims that portions of the requested information are excepted from required public disclosure by sections 3(a)(1) and 3(a)(10) of the Open Records Act. Comdisco claims that portions of the requested information are excepted by sections 3(a)(4) and 3(a)(10). Sungard claims that its entire proposal is excepted by sections 3(a)(1), 3(a)(4), and 3(a)(10). CCS claims that its entire proposal is excepted by section 3(a)(4) and claims that "disclosure of CCS's pricing and structure of its bid would provide a competitor with an unfair advantage over CCS in future bidding situations." Finally, AIM claims that its entire proposal is excepted from required public disclosure by section 3(a)(10). Because we have not received letters from the other companies to which portions of the requested information might relate, we will limit the scope of this ruling to the claims made by these five companies. Information relating to other companies must be released.

We have considered the exceptions these companies have claimed and have examined the documents submitted to us for review. Previous open records decisions issued by this office resolve this request. In Open Records Decision No. 541 (1990) at 5, this office held that "[o]nce the competitive bidding process has ceased and a contract has been awarded, section 3(a)(4) will not except from disclosure either information submitted with a bid or the contract itself." As you have informed us that the competitive bidding process has concluded and the relevant contract has been awarded, none of the companies may properly invoke the section 3(a)(4) exception.

Section 3(a)(10) excepts from required public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or

confidential by statute or judicial decision." In making trade secret determinations under section 3(a)(10), this office will accept a claim as valid if the claimant establishes a *prima facie* case for its assertion of trade secrets that is unrebutted *as a matter of law*. Open Records Decision No. 552 (1990) at 5. Whether a claimant makes a *prima facie* case depends on whether its arguments, as a whole, correspond to the criteria for trade secrets detailed in the Restatement of Torts and adopted by the Texas courts. *Id.* at 2-3.

Please note, however, that pricing proposals may be withheld under section 3(a)(10) only during the bid submission process. Open Records Decision No. 319 (1982). Accordingly, Part XI of the Coopers and Lybrand proposal; the part titled "Fee Structure and Acceptance" of the Comdisco proposal; Part XI and Schedule A of Attachment 3 of the Sungard proposal; and Part XI of the AIM proposal must be disclosed.

Coopers & Lybrand claims that portions of their proposal to the City of Austin constitutes trade secrets, including portions of Parts II through IV and Part VIII. Coopers & Lybrand has demonstrated that release of this information would substantially damage its competitive position. The firm advises us that this information is not generally known outside its business. We are further advised that this information is known to only a few senior employees of Coopers & Lybrand, that much time and money are expended in ensuring that the information is not divulged by the firm's clients and potential clients, that much money and time were expended developing the proposal, and that the proposal is not easily acquired or duplicated by others. We conclude that Coopers & Lybrand has made the requisite *prima facie* case for the portions of the requested information for which it claims trade secret protection. *See* Open Records Decision No. 552. Accordingly, we conclude that this information is excepted from required public disclosure by section 3(a)(10).

Comdisco has also made the requisite *prima facie* case for the portions of the requested materials which it claims are excepted from required public disclosure under section 3(a)(10). Comdisco advises us that its "consulting methodology is the culmination of thousands of hours of consulting experiences as well as the experience gained through 63 officially-declared customer disasters." Comdisco also asserts that its "methodologies, strategies and explanations as to the steps it takes to create an effective disaster recovery plan for its customer comprise its formula which is used in its business." Because Comdisco's arguments correspond to the

criteria for trade secrets as defined in the Restatement of Torts, we conclude that, with the exception of those materials noted on page 3, those portions of the requested materials for which it claimed the section 3(a)(10) exception are excepted from required public disclosure.

In support of its claim for a section 3(a)(10) exception, Sungard advises us that "the contents of the Proposal have been made known only to the City of Austin," and that it "submitted a Non-Disclosure Stipulation on page 'i' of its Proposal designating its contents 'confidential.'" Sungard also indicates that extensive measures were taken to guard the secrecy of the requested materials, that some of the requested information was developed over a ten year period at great expense to the company, and that "it would be difficult, if not impossible, for a third party to obtain the information contained in the Proposal." We conclude that Sungard has made the requisite *prima facie* case for nondisclosure of trade secret information. With the exception of those materials noted on page 3, the City of Austin must withhold the requested information under section 3(a)(10).

CCS, however, has not demonstrated a *prima facie* case. CCS's argument for nondisclosure is limited to a conclusory statement that release of the requested information would provide a competitor an unfair advantage. CCS has failed to demonstrate how the requested information constitutes a trade secret or corresponds to the criteria set forth in the Restatement of Torts. In addition, neither the City of Austin nor CCS has demonstrated that the requested information is excepted from required public disclosure by section 3(a)(1). This office is aware of no basis for withholding the information under section 3(a)(1). We conclude, therefore, that the CCS proposal may not be withheld from required public disclosure under sections 3(a)(10) or 3(a)(1).

In support of its claim section 3(a)(10) exception, AIM advises us that Section III of its proposal is "extracted directly from our proprietary AIM/CORP™ business resumption planning methodology [which is] conveyed only under license to [their clients]." AIM also advises us that this methodology was developed over a seven year period at considerable expense and could not be easily duplicated. AIM asserts that it has taken every effort to prevent disclosure of this information to its competitors. AIM also asserts that Section IV of its proposal contains materials relating to its methodology. We conclude that AIM has made the requisite *prima facie* case with respect to Sections III and IV of its proposal. The City of Austin

must withhold this information from required public disclosure under section 3(a)(10) of the Open Records Act.¹

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-603.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GK/lcd

Ref.: ID#s 13641, 13882, 13832, 13852, 13860, 13912, 13976, 14053, 14210

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¹Because we resolve your request under sections 3(a)(4) and 3(a)(10), we need not address the general applicability of section 3(a)(1) at this time.

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